Omar bin Shaari v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–419 OF 2010
ABDUL MALIK ISHAK, AZAHAR MOHAMED AND ZAWAWI SALLEH JJCA
16 AUGUST 2013

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Criminal Procedure — Trial — Miscarriage of justice — Failure of trial judge to undertake maximum evaluation of evidence at end of prosecution's case — Whether erroneous approach adopted to determine accused's guilt — Whether statement incriminating accused wrongly admitted under s 32 of the Evidence Act 1950 — Whether conditions precedent to admission of statement under s 32 not satisfied — Whether defence's case not given due consideration

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The appellant was convicted and sentenced to death by the High Court for murdering a woman ('the deceased'). His instant appeal against conviction and sentence was based on grounds that the trial judge: (a) failed at the end of the prosecution's case to undertake a maximum evaluation of the evidence adduced to determine if a prima facie case had been made out; (b) erred in admitting into evidence a statement made by a foreigner ('Farok') to the police under s 112 of the Criminal Procedure Code ('CPC') which incriminated the appellant; and (c) failed to sufficiently consider the defence's case given there was no rebuttal of it by Farok. Eleven days after the deceased was reported missing, her decomposed body was found on a hill slope, her hands bound behind her back with nylon string. There was no jewellery on the body. The cause of death was manual strangulation. According to the prosecution's evidence, police recovered a handphone used by the deceased from the appellant when he was arrested and further investigations showed he had pawned her jewellery to borrow money on two occasions. Farok's s 112 statement ('P39') alleged it was the appellant who killed the deceased and that he and the appellant disposed of the body on the hill slope. Farok, a Burmese national, was deported back to his home country after serving sentences for immigration and drug offences and he was not called to testify during the trial. The appellant in his defence admitted he knew the deceased but denied he killed her or that he instructed Farok to do so. The appellant said it was Farok who gave him the deceased's handphone and also asked him to pawn the jewellery as he did not have valid documents to carry out the transaction.

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Held, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) The judgment did not show whether the trial judge, at the close of the

prosecution's case, had undertaken a positive or maximum evaluation of the credibility and reliability of all the evidence adduced so as to determine whether each essential ingredient of the offence had been established in order to make a finding whether a prima facie case had been made out. The carrying out of such an undertaking, pursuant to s 180(1) and (4) of the CPC, should be reflected in the judgment. That failure in this case was a serious non-direction which amounted to a misdirection (see para 12).

(2) The judgment, on the contrary, discussed at some length the appellant's defence and was indicative of an erroneous approach in determining his guilt. It came dangerously close to putting the burden on the appellant to establish his innocence. This was highly unsatisfactory (see para 12).

(3) It was wrong of the trial judge to have admitted Farok's statement under s 32 of the Evidence Act 1950 as the conditions precedent thereunder were not satisfied and strictly proved. Police negligence or inadvertence was not a ground for admission of a statement under s 32. Despite the trial judge finding that the police had taken no reasonable effort to locate Farok, he still held the statement admissible. This rendered the conviction unsafe. The court was not prepared to say that on the facts had that error not been made by the trial judge, the only reasonable and proper verdict would have been that the appellant was guilty as charged (see paras 16 & 17).

(4) In the absence of any denial or rebuttal from Farok to the defence's case, the trial judge ought to have considered the appellant's explanation as to how he had obtained the articles that belonged to the deceased. The trial judge's failure to consider the appellant's evidence in its proper context seriously prejudiced him. It was the trial judge's duty to consider the defence no matter how weak or unreasonable it was (see para 18).

(5) There was no finger-print or DNA evidence to link the appellant to the murder. Even though the prosecution's evidence concerning the recovery of the deceased's belongings could raise suspicion that the appellant was involved in the murder, benefit of the doubt had to be given to him based on the circumstances of the case. There might be an element of truth and suspicion in the case against the appellant but suspicion was not evidence and could not be made the basis for his conviction on the charge (see paras 19 & 20)

[Bahasa Malaysia summary

Perayu telah disabit dan dihukum mati oleh Mahkamah Tinggi kerana membunuh seorang wanita ('si mati'). Rayuannya terhadap sabitan dan hukuman adalah berasaskan alasan-alasan bahawa hakim perbicaraan telah: (a) gagal di akhir kes pendakwaan untuk membuat penilaian maksimum berhubung keterangan yang dikemukakan untuk menentukan jika satu kes

prima facie telah dibuktikan; (b) terkhilaf kerana menerima keterangan suatu penyataan yang telah dibuat oleh seorang warga asing ('Frank') kepada polis di bawah s 112 Kanun Tatacara Jenayah ('KTJ') yang mempersalahkan perayu; dan (c) gagal untuk mempertimbangkan secukupnya kes si mati memandangkan tiada bantahan terhadapnya oleh Farok. Selepas 11 hari kehilangan si mati dilaporkan, mayat reputnya telah ditemui di cerun bukit, tangannya diikat ke belakang dengan tali nylon. Tiada barang kemas pada badannya. Sebab kematian adalah kerana dicekik. Menurut keterangan pendakwaan, polis telah menemui telefon bimbit yang digunakan oleh si mati daripada perayu semasa dia ditangkap dan siasatan selanjutnya menunjukkan dia telah menggadaikan barang kemasnya untuk meminjam wang sebanyak dua kali. Penyataan s 112 Farok ('P39') mengatakan perayu telah membunuh si mati dan bahawa dia dan perayu telah membuang mayat itu di cerun bukit tersebut. Farok, seorang warganegara Burma, telah dihantar pulang semula ke negaranya selepas menjalani hukuman kerana kesalahan-kesalahan imigresen dan dadah dan dia tidak dipanggil untuk memberi keterangan semasa perbicaraan. Perayu dalam pembelaannya mengakui dia mengenali si mati tetapi menafikan telah membunuhnya atau bahawa dia telah mengarah Farok berbuat demikian. Perayu menyatakan Farok yang telah memberikan kepadanya telefon bimbit si mati dan juga memintanya untuk menggadaikan barang kemas itu kerana dia tiada dokumen sah untuk menjalankan transaksi tersebut.

Diputuskan, mengetepikan sabitan dan hukuman dan melepas dan membebaskan perayu:

(1) Penghakiman tidak menunjukkan sama ada hakim perbicaraan, di penutup kes pendakwaan, telah membuat penilaian positif atau maksimum berhubung kewibawaan dan kebolehpercayaan semua keterangan yang dikemukakan bagi menentukan sama ada setiap faktor penting kesalahan itu telah dibuktikan bagi tujuan membuat penemuan sama ada kes prima facie telah dibuktikan. Pelaksanaan akujanji tersebut, menurut s 180(1) dan (4) KTJ, patut digambarkan dalam pengakiman. Kegagalan tersebut dalam kes ini suatu tanpa arah serius yang menjadi suatu salah arah (lihat perenggan 12).

(2) Penghakiman itu, sebaliknya, membincangkan secara terperinci tentang pembelaan perayu dan menunjukkan satu pendekatan yang salah dalam menentukan kesalahannya. Ia hampir meletakkan beban ke atas perayu untuk membuktikan dia tidak bersalah. Ini adalah sangat tidak memuaskan (lihat perenggan 12).

(3) Adalah salah untuk hakim perbicaraan menerima penyataan Farok di bawah s 32 Akta Keterangan 1950 kerana prasyarat-prasyarat di dalamnya tidak dipatuhi dan dibuktikan dengan tegas. Kecuaian atau ketidaksengajaan polis bukan alasan bagi penerimaan penyataan di

bawah s 32. Walaupun hakim perbicaraan mendapati bahawa pihak polis telah tidak mengambil usaha yang munasabah untuk mencari Farok, beliau masih memutuskan penyataan itu boleh diterima. Ini dijadikan sabitan itu tidak selamat. Mahkamah tidak bersedia untuk mengatakan bahawa berdasarkan fakta jika bukan kerana kesilapan itu tidak dibuat oleh hakim perbicaraan maka satu-satunya keputusan yang munasabah dan wajar untuk dibuat adalah bahawa perayu bersalah sebagaimana yang dituduh (lihat perenggan 16 & 17).

(4) Dengan ketiadaan apa-apa penafian atau bantahan daripada Farok terhadap kes pembelaan, hakim perbicaraan patut mempertimbangkan penjelasan perayu berhubung cara dia telah mendapatkan barang-barang milik si mati. Kegagalan hakim perbicaraan untuk mempertimbangkan keterangan perayu dalam konteks sewajarnya dengan serius menprejudiskannya. Adalah kewajipan hakim perbicaraan untuk mempertimbangkan pembelaan itu walau bagaimana ia tidak kukuh atau tidak munasabah (lihat perenggan 18).

(5) Tiada bukti cap jari atau DNA untuk mengaitkan perayu kepada pembunuhan itu. Walaupun keterangan pendakwaan berkaitan pemulangan barang milik si mati menimbulkan syak bahawa perayu terlibat dalam pembunuhan itu, manfaat keraguan perlu diberikan kepadanya berdasarkan keadaan kes itu. Kemungkinan terdapat elemen kebenaran dan syak wasangka dalam kes terhadap perayu tetapi syak wasangka bukan merupakan bukti dan tidak boleh dijadikan asas untuk sabitannya terhadap pertuduhan itu (lihat perenggan 19 & 20).]

Notes

For cases on miscarriage of justice, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5465–5470.

Cases referred to

Alcontara a/ Ambrose Anthony v PP [1996] 1 MLJ 209, FC (refd)
Ganapathy a/l Rengasamy v PP [1998] 2 MLJ 577, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137; [1993] 3 CLJ 1, SC (refd)
Ramli bin Kechik v PP [1986] 2 MLJ 33; [1986] 1 CLJ 308, SC (refd)
Stirland v Director of PP [1944] 2 All ER 13, HL (refd)

Legislation referred to

Criminal Procedure Code ss 112, 180(1), (4)
Evidence Act 1950 s 32, 32(i)
Penal Code s 302

Appeal from: Criminal Trial No 45–23 of 2007 (High Court, Pulau Pinang)

Chong Joo Tian (JT Chong Associates) for the appellant.

Nurulhuda Nur'aini bt Mohd Nor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] The appellant Omar bin Shaari was charged and tried in the High Court at George Town for committing murder of Faridah bt Mohd Sharif ('the deceased'), punishable under s 302 of the Penal Code ('the Code'). The offence was said to have been committed on 12 September 2006 between the hour of 11am to 2pm at the appellant's house with an address known as No 307-1, Jalan Dato Keramat, Daerah Timur Laut, Pulau Pinang. It was the prosecution's case that the appellant was the person who murdered the deceased and then transported the deceased body by car and left it at a hill slope at Minden Height.

[2] At the conclusion of the trial, the learned trial judge convicted the appellant and sentenced him to the mandatory death penalty prescribed by the Code. The appellant then appealed to this court. We heard his appeal, wherein at its conclusion we unanimously allowed it. As a result, the conviction was quashed and the sentence set aside. We now give our reasons.

[3] The relevant facts giving rise to the charge of murder against the appellant are as follows. There is no eye witness to this crime. Zaharah bt Mohd Sharif ('PW11'), the sister of the deceased said that every Tuesday at about 11.40am, she would bring the deceased to work at the Penang Club. PW11 last saw the deceased on 12 September 2006 at PW11's home at about 11.30am. At about 2.00pm, PW11 looked for the deceased at the club but did not find her. She then made a call to Roslan ('PW15'), the deceased's husband. PW11 tried to call the deceased's handphone but failed. PW15 tried to look for the deceased but to no avail. Sharidah bt Mohd Shariff ('PW3'), the elder sister of the deceased last saw her on 11 September 2006 at night. When she was informed by PW11 on 12 September 2006 that the deceased failed to appear by night time, PW3 went to the police station with PW15 to lodge a police report.

[4] ASP Sidambaram a/l Arunasalam ('PW17'), the investigating officer received information on 23 September 2006 at about 3.45pm of a discovery of a body (later identified as the body of the deceased) at Jalan Minden. On arrival at the scene, PW17 noticed that it was a hill slope at Minden Height. PW17 conducted a preliminary inspection of the body and saw that the body of the deceased was in a green and white shirt with a black pant. The hands were bound with a nylon string to the back. There was no jewellery on her body.

[5] The post-mortem on the deceased carried out by the pathologist, Dato'

Dr Bhupinder Singh a/l Jeswant Singh ('PW21') on 24 September 2006 found that the body was in a state of decomposition with hands tied at the wrist joints with a piece of green nylon string. PW21 certified the cause of death of the deceased as manual strangulation. PW21 found that the upper part of the neck of the deceased being strangled. He said that it was possible that such injury could have been caused by plastic bag been applied and was pulled back causing the fracture of the higher bone.

[6] Subsequently, the appellant and his wife were arrested by C/Inspector Mohd Ismail bin Syed Meerah ('PW18') at a house No 142-B, Jalan Md Taib, Jelutong on 26 September 2006. Four handphones were seized from the house. One of it Nokia model N1100 was identified by PW15 to belong to the deceased.

[7] In the course of police investigation, on 26 September 2006 at about 3.30pm, the appellant had led ASP Shamsudin bin Mamat ('PW14') to two gold shops which the appellant had sold some items there. The first shop was Gotama Enterprise at Hutton Lane and the second was Putaran Maju Enterprise, Jalan Dato Keramat. Search list (exh 'P9') was issued for exhs P20-P23 seized at Gotama Enterprise and search list (exh 'P11') for exhs P24-P30 seized at Putaran Maju Enterprise. Goh Soo Beow ('PW6'), the owner of Gotama Enterprise testified that he ran a money lending business. On 12 September 2006, the appellant came to his shop to borrow some money and gave two chains and two rings (exhs P20-P23) as collateral. The sum borrowed was RM2,700. A receipt was issued for the said transaction (exh 'P8'). Wong Kim Lye ('PW7'), the owner of Putaran Maju Enterprise also ran a money lending business. He testified that on 14 September 2006 at about 10.45am, the appellant came to borrow some money and gave one chain, one pendant and four earrings as collateral for the sum of RM1,200 borrowed.

[8] At the trial, the prosecution tendered a statement of Bakar bin Arabee (exh 'P16'), the owner of house No 307-1, Jalan Dato Keramat, Pulau Pinang who has passed away, recorded under s 112 of the Criminal Procedure Code ('CPC') on 29 September 2006. The statement shows that the appellant was renting the said house on 1 September 2006 for a rental of RM400. When the appellant failed to pay the sum, Bakar asked the appellant to vacate the house on 10 September 2006. The appellant asked for time until 13 September 2006. When Bakar returned on 13 September 2006, he discovered that the appellant had vacated the house.

[9] Also at the trial, on the application made by the prosecution and after hearing submissions, a statement of one Farok recorded under s 112 of the CPC was admitted under s 32 of the Evidence Act as exh P39. The statement of Farok was recorded on 2 October 2006 by PW17. Farok, a Burmese

national, however was deported back to his country after serving his sentence for immigration and drug offences. According to P39, the appellant was in need of money and that the appellant had told Farok that he wanted to get cash from the deceased. The appellant called the deceased and when she turned up, the appellant asked her for some cash. The deceased said she had none. When the deceased entered the kitchen, the appellant asked Farok to give him a plastic bag which the appellant then used to cover the deceased's head. The appellant asked Farok to tie the deceased's hands with a nylon string. After half an hour, the appellant asked Farok to check if the deceased had died. When Farok told the appellant that she had died, the appellant took her handphone, some cash and her jewelleries. The appellant left to sell the jewelleries and came back with some cash. Farok was given RM300. They then disposed the body near a hill slope in Gelugor. We will say more about Farok's statement later in this judgment.

[10] Upon his defence being called, the appellant elected to give sworn evidence. The appellant admitted that he knew the deceased. The appellant said he had to move from Bakar's house at No 307-1, Jalan Dato Keramat as the appellant had some misunderstanding with him pertaining to the rental. This caused the appellant to move out from the said house on 13 September 2006.

[11] According to the appellant, Farok had previously borrowed money from him and had given him some jewelleries to be pawned as Farok had no documents. The appellant admitted pawning the jewelleries on two occasions but said that the first time Farok was waiting outside the shop. After receiving RM2,000, the appellant handed the money to Farok. Farok then paid the appellant the money he owed. The second time Farok was with him in the shop. Farok also gave him a handphone and asked the appellant to register it as Farok had no valid documents. The appellant also bought a sim-card for the handphone but Farok failed to collect the handphone so the appellant kept and used it. The appellant denied killing the deceased or instructing Farok to do so.

[12] Before us, learned counsel for the appellant argued that the learned trial judge erred in law and in fact when he decided that the prosecution had succeeded in proving a prima facie case against the appellant at the end of the prosecution's case. First and foremost, it has to be noted that the learned trial judge never discussed or commented in his judgment the various parts of the evidence adduced by the prosecution which the learned trial judge held made out a prima facie case against the appellant. On the contrary, the learned trial judge in his judgment discussed at some length the defence of the appellant. This is highly unsatisfactory. Reading the judgment of the learned trial judge, it appears to us to be indicative of an erroneous approach in determining the guilt of the appellant. It comes dangerously near to putting the burden on the appellant to establish his innocence. One thing is clear. The cardinal and

A fundamental principle in the administration of our criminal justice is that it is not for the appellant to prove his innocence, but it is for the prosecution to make out its case beyond all reasonable doubt. By virtue of s 180(1) of the CPC, when the case for the prosecution is concluded, the learned trial judge must consider whether the prosecution has made out a prima facie case against B the accused. In accordance with the provisions of s 180(1) and (4) of the CPC, it is the duty of the learned trial judge to undertake a positive or maximum evaluation of the credibility and reliability of all the evidence adduced so as to determine whether each and essential ingredients of the offence has been established, in order to make a finding whether or not the prosecution has C made out a prima facie case against the accused. Whether such an undertaking has been carried out should be reflected in the judgment. Unfortunately, in the present case, the judgment of the learned trial judge did not indicate such an exercise had been carried out. In our view, this is a serious non-direction which amounts to a misdirection by the learned trial judge.

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[13] In the present case, what is glaring is that the prosecution relied heavily on the written statement by Farok to prove that the deceased was killed by the appellant at his house at No 307-1, Jalan Dato Keramat. Needless to say, this statement has a very strong bearing in the way the learned trial judge viewed the E prosecution's case. It is against this backdrop, learned counsel argued that Farok's statement was inadmissible for the reason that the conditions precedent for the application of s 32 of the Evidence Act 1950 had not been satisfied by the prosecution. Based on the facts of the case, we find there is merit in this argument.

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[14] Under s 32(i) of the Evidence Act, a statement made by a person who cannot be called as a witness is admissible in evidence, provided that:

(a) the maker is dead;

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(b) the maker cannot be found;

(c) the maker has become incapable of giving evidence; or

(d) the attendance of the maker cannot be procured without an amount of H delay or expense which is unreasonable in the circumstances of the case.

[15] It cannot be disputed that Farok is a material witness in the unfolding of the narrative of the prosecution's case. In the context of the application of s 32, the question then arises whether Farok cannot be found or whether his I attendance cannot be procured without an amount of delay or expense which is unreasonable in the circumstances of the case. It is quite important to note that Farok was arrested on 21 September 2006. His statement was recorded on 2 October 2006. He was then released to the relevant immigration authority for the purpose of repatriation to Burma on 3 January 2007. There is no

evidence that Farouk is now dead. There is also no evidence that Farok cannot be found after reasonable effort has been made by the police in locating him. On the contrary, the non-production of Farok as a witness was as result of police negligence as found by the learned trial judge in his judgment as follows:

> Di dalam soal ini, perlulah diakui bahawa ianya sememangnya wujud kecuaian yang amat ketara, balk di pihak Polis mahupun di pihak Imigresen, hatta oleh pihak Penjara sekalipun. Terdapat 'communication break-down' di antara satu Jabatan dengan Jabatan yang lain. Tidak terdapat koordinasi yang kukuh di antara sesama Jabatan, sehingga menyebabkan saksi yang amat penting seperti Farok ini 'terlepas' begitu sahaja, dan tidak sepatutnya, dengan begitu sahaja. Di sini dapat dilihat yang kurangnya inisiatif serta proaktif dan tiadanya tindakan bersepadu di pihak yang tertentu.

[16] The learned trial judge has made a finding that no reasonable effort has been made by the police in tracing or locating Farok. Yet, the learned trial judge held that Farok's statement was admissible as can be seen at p 199 of the appeal record where the learned trial judge said:

> Keterangan dari Farokh Khan ini boleh diterima dan ditanda sebagai eksibit.
>
> (i) Usaha-usaha tak dilakukan oleh pihak polis melalui I/O dan Inspektor Zulkefli.
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> (ii) Comment straight down dan Polis kepada Depo Imigresen adalah lebih berbentuk Pentadbiran.

[17] We do not agree. In our judgment, it was wrong and improper for the learned trial judge to admit the statement under s 32 of the Evidence Act. The conditions precedent under s 32 have not been satisfied and strictly proved. Police negligence or inadvertence is not a ground for admission of a statement under s 32 of the Evidence Act. A statement is only admissible under s 32 of the Evidence Act, if and only if, such statement has satisfied the conditions precedent as we have discussed earlier. The fulfilment of the conditions precedent under s 32 must be strictly proved by the prosecution. In the present case, the statement is therefore not admissible in evidence. Where evidence has been wrongly admitted, this will render the conviction unsafe unless we are satisfied that had the error not been made, the only reasonable and proper verdict would nevertheless have been one of guilty (see *Stirland v Director of Public Prosecutions* [1944] 2 All ER 13). We are of the view that the conviction was unsafe. We are not prepared to say that based on the facts, had the error not been made by the learned trial judge, the only reasonable and proper verdict would have been one of guilty of the appellant as per the murder charge.

[18] This leads on to the argument of learned counsel that the defence of the appellant had not received any, or any sufficient attention from the learned trial

judge. It will be recalled that in his defence, the appellant said that he obtained the jewelleries and the handphone from Farok for the purposes mentioned by the appellant. In the absence of any denial or rebuttal from Farok, the learned trial judge ought to have considered the explanation given by the appellant as to how he had obtained the articles belonging to the deceased. A perusal of his judgment shows that the learned trial judge did not consider the appellant's evidence in its proper context. In our judgment, this omission had seriously prejudiced the appellant. This was an error on a very crucial point directly relevant to the defence. It was the duty of the learned trial judge to consider that defence, no matter how weak or unreasonable the defence story may be (see: *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577 and *Alcontara a/ Ambrose Anthony v Public Prosecutor* [1996] 1 MLJ 209). In our view, this is a serious non-direction which amounts to a misdirection by the learned trial judge warranting appellate intervention (see *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137; [1993] 3 CLJ 1).

[19] Even though the evidence put forward by the prosecution concerning the recovery of the deceased's belongings could raise a suspicion that the appellant was involved in the murder, benefit of the doubt must and should be given to the appellant based on the circumstances of this case. There may be an element of truth and suspicion in the prosecution case against the appellant. However, a suspicion is not evidence and cannot be made the basis for conviction of the appellant on the charge against him. The fairness of a trial according to law is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted (see *Ramli bin Kechik v Public Prosecutor* [1986] 2 MLJ 33; [1986] 1 CLJ 308).

[20] Another point that must be mentioned here is that there is no physical evidence linking the deceased's death to the appellant, in that there was no finger-print evidence and DNA evidence to link the appellant with the death of the deceased.

[21] The upshot of all this is that we were of the view that the appellant's conviction was wholly unsafe. It is always a matter of regret that a cruel murder should go unpunished. Nonetheless, as in any other cases, this case must be judged based upon the weight of available evidence and proper judicial appreciation of such evidence and that there should not be a miscarriage of

justice. This appeal was, therefore, allowed. Accordingly, we quashed and set aside the conviction and sentence against the appellant. The appellant was acquitted and discharged.

Conviction and sentence set aside and appellant acquitted and discharged.

Reported by Ashok Kumar